

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
vs)	16-CR-254
)	
DAVID D. KLEPADLO,)	
)	
Defendant)	
_____)	

TRANSCRIPT OF PROCEEDINGS
SENTENCING OBJECTIONS
BEFORE THE HONORABLE A. RICHARD CAPUTO
MONDAY, SEPTEMBER 30, 2019; 10:00 A.M.
WILKES-BARRE, PENNSYLVANIA

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10:05AM 1 THE COURT: As far as today's sentencing concerned, there
10:05AM 2 are multiple objections that need to be resolved, and frankly,
10:05AM 3 there's a lot of documents that have come along lately. So what
10:05AM 4 we're going to do today is we will deal with the objections and
10:05AM 5 we're going to reschedule this sentencing for another day.

10:05AM 6 But we will deal with the objections, and we will see where
10:05AM 7 we are at the end of that. I may or may not make a ruling on
10:05AM 8 that now or issue an opinion regarding same. I don't know which
10:05AM 9 way we're going to go. This hearing will determine where we are
10:05AM 10 at that point. Okay?

10:05AM 11 MR. SHEPPARD: Yes, Your Honor.

10:05AM 12 THE COURT: There is two sentencing memoranda, a
10:05AM 13 Pre-Sentence Report regarding this offense, one on
10:06AM 14 behalf -- one regarding Mr. Klepadlo and the other the
10:06AM 15 corporation, and there have been a variety of documents
10:06AM 16 submitted, the sentencing memoranda also I received, but
10:06AM 17 there's a Board Resolution of Greenfield Township Sewer
10:06AM 18 Authority. Does everybody have a copy of that?

10:06AM 19 MR. SHEPPARD: I received it this morning, Your Honor?

10:06AM 20 THE COURT: As did I.

10:06AM 21 MS. OLSHEFSKI: Yes, Your Honor.

10:06AM 22 THE COURT: So let's deal with the objections that have been
10:06AM 23 filed.

10:06AM 24 Essentially, the major objection is the question involving
10:07AM 25 Paragraph 24 of the Pre-Sentence Report, which is the inclusion

10:07AM 1 of the enhancement for toxic substances, and I'll hear from
10:07AM 2 counsel Mr. Sheppard regarding their position.

10:07AM 3 MR. SHEPPARD: Yes, good morning, Your Honor. Mark Sheppard
10:07AM 4 on behalf of David Klepadlo. With me is my co-counsel Tim
10:07AM 5 Bergere and the newly admitted Ms. Lowry.

10:07AM 6 Your Honor, if I may, just as a matter of housekeeping, we
10:07AM 7 got the amended PSR, I guess, late Thursday or Friday. There is
10:07AM 8 just two factual corrections that I have spoken with the
10:07AM 9 Probation Officer about, I'd like to get it on the record, just
10:07AM 10 so we have a clean record with regard to that.

10:07AM 11 Your Honor, I would direct the Court to Paragraph 62 on
10:08AM 12 Page 15 of the amended PSR.

10:08AM 13 THE COURT: All right.

10:08AM 14 MR. SHEPPARD: Your Honor, there, there's a paragraph at the
10:08AM 15 bottom that relates to the income of the Defendant's business,
10:08AM 16 David D. Klepadlo and Associates, which also has pled guilty to
10:08AM 17 the one count of filing false statements.

10:08AM 18 Your Honor, I simply wish to point out that the income
10:08AM 19 numbers that are reported there are gross income numbers. I
10:08AM 20 confirmed that with Mr. Zdaniewicz, and, Your Honor, the net
10:08AM 21 income number for 2017, which reported a gross amount of
10:08AM 22 \$67,116, was actually \$5240, based upon the tax return that was
10:08AM 23 filed.

10:08AM 24 And, Your Honor, they're not stated there, but in 2018, the
10:09AM 25 Defendant reported gross income through his business of \$12,000

10:09AM 1 and reported a net loss of \$8,000. And as noted in the
10:09AM 2 objections, which were attached to the addendum, Your Honor,
10:09AM 3 that was primarily as a result of the fact that the consulting
10:09AM 4 business, David Klepadlo and Associates, voluntarily
10:09AM 5 relinquished -- Mr. Klepadlo voluntarily relinquished his
10:09AM 6 Certificate to be a Sewage Treatment Plant Operator, pursuant
10:09AM 7 to the plea agreement, and, therefore, lost all four of the
10:09AM 8 contracts that he had. So there was very limited income coming
10:09AM 9 into the business, and I wanted to point that out.

10:09AM 10 The other objection, Your Honor, that factually needed to
10:09AM 11 be resolved is with regard to Paragraph 63 on the next page,
10:09AM 12 which is the Defendant's Statement of Assets. This is just a
10:09AM 13 typographical error, and I apologize to Mr. Zdaniewicz because
10:09AM 14 I didn't point it out sooner, the asset numbers there and also
10:09AM 15 the income numbers there, Your Honor, are numbers for Mr.
10:10AM 16 Klepadlo's entire household, both he and his wife.

10:10AM 17 You would note, Your Honor, that on the income numbers,
10:10AM 18 there's actually a line item for Linda Klepadlo's income at the
10:10AM 19 top of Page 17.

10:10AM 20 Again, I spoke with the Probation Officer about that this
10:10AM 21 morning, and he concurs that these are, in fact, numbers for
10:10AM 22 both Mr. Klepadlo and his wife. Just so the record is clear and
10:10AM 23 the PSR is accurate, Your Honor. I don't expect that we are
10:10AM 24 going to ultimately be -- depending where the guideline range
10:10AM 25 comes out and, ultimately, what the Court decides, with regard

10:10AM 1 to this restitution issue -- it may or may not become a
10:10AM 2 question of the ability to pay.

10:10AM 3 THE COURT: So the statement that the amounts reflect Mr.
10:10AM 4 Klepadlo's one-half interest is not so?

10:10AM 5 MR. SHEPPARD: That is correct, Your Honor, it is their
10:10AM 6 joint interest.

10:10AM 7 THE COURT: All right.

10:10AM 8 MR. SHEPPARD: So I think if you add the word, not, Your
10:11AM 9 Honor, I think we're good to go.

10:11AM 10 THE COURT: Thank you.

10:11AM 11 MR. SHEPPARD: So those were the only factual objections we
10:11AM 12 had, Your Honor, to the amended Pre-Sentence Report. And as
10:11AM 13 Your Honor pointed out, we do have a number of legal objections
10:11AM 14 to the guideline computation.

10:11AM 15 THE COURT: Let's deal with those.

10:11AM 16 MR. SHEPPARD: Thank you, Your Honor. With regard to the
10:11AM 17 first issue, as Your Honor pointed out, the issue is the
10:11AM 18 application of the guideline range here, whether it's 2(q)1.2,
10:11AM 19 which relates to discharges for toxic and hazardous substances
10:11AM 20 or 2(q)1.3, which relates to the discharge of a pollutant, in
10:11AM 21 violation of a permit. Both of these offenses also address the
10:11AM 22 record-keeping offense to which Mr. Klepadlo and the entity
10:11AM 23 pled guilty.

10:11AM 24 Your Honor, as we stated in our Sentencing Memo and also in
10:11AM 25 the objections that were attached to the PSR, it is our

10:11AM 1 position that the proper guideline is 2(q)1.3. And, Your Honor,
10:11AM 2 the reason that it's important is it's a base offense level of
10:12AM 3 6 versus a base offense level of 8 for the toxic and hazardous
10:12AM 4 substance.

10:12AM 5 Your Honor, the argument that we have set forth is,
10:12AM 6 essentially, that the Court needs to look to the count of
10:12AM 7 conviction in deciding the guideline range, and that the
10:12AM 8 statutory basis and the basis for the plea here, Your Honor,
10:12AM 9 is, essentially, that Mr. Klepadlo and the company have pled
10:12AM 10 guilty to filing false statements relating to the failure to
10:12AM 11 properly test daily for the items at the two plants, DO and pH.
10:12AM 12 And, also, at Benton Nicholson, I believe it was just pH.

10:12AM 13 Your Honor, it is our position that when you look at the
10:12AM 14 count of conviction here, you're talking about a discharge from
10:12AM 15 a sewage treatment plant, in violation of a permit because the
10:12AM 16 testing was not done, which does not, Your Honor, equate to the
10:12AM 17 discharge of a toxic or hazardous substance.

10:12AM 18 Your Honor, we would also make the argument under the Clean
10:13AM 19 Water Act, in response to the Government's position that
10:13AM 20 ammonia is a hazardous or toxic substance, that, number one,
10:13AM 21 under the Clean Water Act itself, which is the offense to which
10:13AM 22 he has pled guilty, ammonia is listed as a pollutant and not a
10:13AM 23 toxic or hazardous substance.

10:13AM 24 With regard to sewage treatment plants, themselves, we
10:13AM 25 argue that in every single case that we found, reported or

10:13AM 1 unreported in the country, that involved the discharge of
10:13AM 2 sewage from a sewage treatment plant, 2(q)1.3 was the guideline
10:13AM 3 that was applied.

10:13AM 4 And, Your Honor, the reason for that, we submit, is that
10:13AM 5 with regard to municipal waste, and, in particular, the
10:13AM 6 municipal waste that came from these two rather small plants,
10:13AM 7 ammonia and ammonia nitrogen -- and we do have Mr. Long here
10:13AM 8 who can testify to this -- Your Honor, are natural components
10:13AM 9 of sewage treatment. This is not a situation where you had a
10:14AM 10 discharge where someone was pouring ammonia into a stream or
10:14AM 11 that you were discharging from a toxic plant or that you were
10:14AM 12 discharging from a commercial plant.

10:14AM 13 Your Honor, the three cases that the Government relies
10:14AM 14 upon, we believe, are inapposite. One of them relates to lead
10:14AM 15 paint being discharged into a river. I don't think anyone is
10:14AM 16 going to argue that that's a toxic substance.

10:14AM 17 The other two, Your Honor, one related to discharges from a
10:14AM 18 slaughterhouse involving chicken processing. Again, I don't
10:14AM 19 believe anyone is going to argue that discharges from a chicken
10:14AM 20 slaughterhouse would involve toxic substances.

10:14AM 21 Here, Your Honor, we have a naturally-occurring component
10:14AM 22 of sewage treatment, every single sewage treatment plant in the
10:14AM 23 country, big or small, discharges ammonia nitrates or ammonia
10:14AM 24 nitrogen, and, therefore, Your Honor, to say that this offense
10:14AM 25 should be subject to the guideline which is reserved for the

10:15AM 1 most serious and hazardous and toxic discharges is a
10:15AM 2 substantial overstatement, and it overstates, frankly, the
10:15AM 3 seriousness of this offense.

10:15AM 4 Particularly, Your Honor, where we are talking about a
10:15AM 5 record-keeping violation, where Mr. Klepadlo has pled guilty to
10:15AM 6 the failure to monitor and oversee the proper testing at these
10:15AM 7 two facilities.

10:15AM 8 Your Honor, I would refer, also, to our memoranda, where we
10:15AM 9 cite a number of cases, at least, nine or ten separates places
10:15AM 10 where 2(q)1.3 was applied involving a sewage treatment plant or
10:15AM 11 the discharge of sewage, both either raw sewage or even treated
10:15AM 12 sewage. Again, Your Honor, that's an important point here. We
10:15AM 13 are talking about treating sewage coming out of these plants.
10:15AM 14 These are not untreated discharges.

10:15AM 15 So, again, Your Honor, under the Clean Water Act and, also,
10:15AM 16 given that we're talking about these sewage treatment plants,
10:16AM 17 we submit 2(q)1.3 is the proper guideline range.

10:16AM 18 THE COURT: All right. Counsel.

10:16AM 19 MR. HARRELL: Good morning, Your Honor. My name is Warren
10:16AM 20 Harrell, I'm a Special Assistant United States Attorney from
10:16AM 21 the United States Environmental Protection Office in
10:16AM 22 Philadelphia.

10:16AM 23 There's truly a question of law, here, to begin with. Is
10:16AM 24 ammonia a hazardous substance? The permits, in this case -- and
10:16AM 25 I'm pretty confident I agree with Mr. Sheppard --

10:16AM 1 THE COURT: I don't mean to interrupt you, but is there a
10:16AM 2 distinction between hazardous and toxic?

10:16AM 3 MR. HARRELL: Yes. It's not a toxic water pollutant, I agree
10:16AM 4 with Mr. Sheppard, it's been listed under the different section
10:16AM 5 of the Clean Water Act Section 311 as a hazardous substance.
10:16AM 6 It's on the list of hazardous substances in 40 CFR 302.4, I
10:16AM 7 believe is the correct cite, we have it in our sentencing memo.

10:17AM 8 So the legal question really is, is ammonia a hazardous
10:17AM 9 substance or isn't it? If it's a hazardous substance, then,
10:17AM 10 2(q)1.2 applies if the offense conduct in this case and the
10:17AM 11 relevant conduct involved the discharge of ammonia.

10:17AM 12 If you look at the indictment, the wide-ranging conspiracy
10:17AM 13 that was alleged in Count 1 and all the substantive Clean Water
10:17AM 14 Act charges have to do with, among other things, not taking
10:17AM 15 daily or weekly composite samples at both plants. Composite
10:17AM 16 samples were required for ammonia nitrogen.

10:17AM 17 Failure to operate the plant. We have a witness from DEP
10:17AM 18 who would talk about the effects of improper operation and the
10:17AM 19 actual discharge of these pollutants into the receiving waters
10:17AM 20 in this case at Greenfield and the tributary of Dundaff Creek.

10:17AM 21 So, legally, ammonia is a hazardous substance. The factual
10:17AM 22 question of whether it applies in this case, as we believe it
10:17AM 23 does, because the permit required the monitoring for ammonia
10:18AM 24 nitrogen, ammonia nitrogen was being discharged from the plant,
10:18AM 25 it wasn't being totally removed by the treatment system, and

10:18AM 1 whether the plant was discharging treated wastewater is a core
10:18AM 2 question that the parties disagree about because, you don't
10:18AM 3 show up for 116 days out of a little bit more than six months,
10:18AM 4 to actually have a human being at the plant, it's not going to
10:18AM 5 run properly.

10:18AM 6 So that's the Government's position.

10:18AM 7 THE COURT: So is there disagreement about whether or not
10:18AM 8 ammonia nitrate was a discharged or not? Is there agreement
10:18AM 9 about that?

10:18AM 10 MR. SHEPPARD: Your Honor, we are in agreement with that.
10:18AM 11 It is a permanent substance that is always discharged from
10:18AM 12 every sewage treatment plant. What we disagree about is whether
10:18AM 13 or not there were any exceedances, other than the ones our
10:18AM 14 client actually recorded, with regard to ammonia. And, Your
10:18AM 15 Honor, there is no evidence of any exceedances beyond the
10:19AM 16 permitted limits. The permits themselves, Your Honor, allow for
10:19AM 17 the discharge of ammonia nitrogen. They allow two different,
10:19AM 18 depending on the time of year.

10:19AM 19 Your Honor, our position is that the offense of conviction
10:19AM 20 here, the failure to oversee the proper testing and the
10:19AM 21 submission of false reports. Again, Mr. Klepadlo has not pled
10:19AM 22 guilty to a substantive violation here. This is a
10:19AM 23 record-keeping violation, and that was negotiated as part of
10:19AM 24 the plea agreement.

10:19AM 25 So, Your Honor, we don't disagree that ammonia nitrogen was

10:19AM 1 discharged, what we disagree about, Your Honor, is that it was
10:19AM 2 never discharged in any kind of harmful or dangerous amounts.
10:19AM 3 There is no evidence that there was any discharge in violation
10:19AM 4 of the permitted limits here.

10:19AM 5 So, Your Honor, our position is -- and I would cite the
10:19AM 6 Court specifically to --

10:19AM 7 THE COURT: Before you do that, let me get this straight. So
10:19AM 8 what we're saying -- what everyone is saying here is it was
10:19AM 9 discharged, but we don't know if there were any violations in
10:20AM 10 the discharge amount or intensity, because these tests or
10:20AM 11 records were not kept? Is that right? Am I phrasing that
10:20AM 12 properly?

10:20AM 13 MR. HARRELL: Yes, Your Honor. I would say it's impossible
10:20AM 14 to know if things were being discharged illegally, because he
10:20AM 15 wasn't doing the required testing and then lying to the DEP
10:20AM 16 about making up results.

10:20AM 17 THE COURT: But we're going a step further, aren't we? We're
10:20AM 18 saying, because those tests weren't done, you're concluding
10:20AM 19 that it was a violation, in terms of the amount that was
10:20AM 20 discharged?

10:20AM 21 MR. HARRELL: It was a violation of the permit not to do the
10:20AM 22 sampling. An effluent limit -- a numerical limit in the permit
10:20AM 23 is no different kind of permit requirement than the requirement
10:20AM 24 to do sampling, the required requirement to do operation and
10:21AM 25 maintenance, the requirement to honestly report data. They're

10:21AM 1 all core ingredients of the permit.

10:21AM 2 So the substantive violation here is not doing the
10:21AM 3 sampling, lying about the sampling, and I would just point out
10:21AM 4 that Mr. Long, the Defendant's expert, in his report, relies on
10:21AM 5 DEP sampling that was done at both plants between 2012 and
10:21AM 6 2016, which is only seven samples over a little bit more than
10:21AM 7 four years. Three of those seven samples showed exceedances of
10:21AM 8 the instantaneous max for ammonia.

10:21AM 9 So to say there's no evidence of illegal discharges is not
10:21AM 10 accurate.

10:21AM 11 MR. SHEPPARD: Your Honor, if I may respond, and then same
10:21AM 12 going to ask Mr. Bergere to respond to the last point because
10:21AM 13 it's an important one.

10:21AM 14 First off, Your Honor, under 1(b)1.2(a) of the guidelines,
10:21AM 15 the guidelines require that the count of conviction, not the
10:21AM 16 relevant conduct, be used to determine the offense guideline.
10:22AM 17 That is clear. What they're talking about here -- first off, I
10:22AM 18 don't agree that's relevant conduct for this offense, but
10:22AM 19 assuming that it is, you still need to look to the count of
10:22AM 20 conviction to make the determination under 1(b)1.2(a) of what
10:22AM 21 is the proper guideline range .

10:22AM 22 Your Honor, the offense of conviction, the statutory or the
10:22AM 23 factual basis for the plea was all about Mr. Klepadlo as a
10:22AM 24 responsible officer failing to oversee his employee, a
10:22AM 25 Certified Treatment Plant Operator to do the proper testing.

10:22AM 1 That's what he admitted to, as far back as 2013, to DEP, it's
10:22AM 2 what he admitted to to Mr. Wetland and Mr. Burgess, when they
10:22AM 3 interviewed him in 2015, even before these charges were filed,
10:22AM 4 and that's why he pled guilty. What he hasn't pled guilty to is
10:22AM 5 the substantive offenses that Mr. Harrell was talking about.

10:23AM 6 And under the guidelines, as a matter of law, you must look
10:23AM 7 to the count of conviction, unless there was a specific
10:23AM 8 stipulation to a guideline range, and, clearly, Your Honor,
10:23AM 9 that is not what occurred here. So that is one point, Your
10:23AM 10 Honor. I would cite the case Watterson v. United States. It's
10:23AM 11 on Page 10 of our sentencing memo.

10:23AM 12 The second point, Your Honor, is the argument that Mr.
10:23AM 13 Harrell makes about ammonia exceedances is just a little
10:23AM 14 misleading, because under the permit, Your Honor -- and Mr.
10:23AM 15 Bergere can explain this better than I can -- but under the
10:23AM 16 permit, Your Honor, this was a weekly composite sample of
10:23AM 17 ammonia that was supposed to be conducted, again, it was not
10:23AM 18 the daily sampling to which my client admitted they didn't do.

10:23AM 19 And, Your Honor, what they're talking about is an
10:23AM 20 instantaneous max, which is a grab sample, and that is
10:23AM 21 different from the sample that was required under the permit.
10:24AM 22 And Mr. Bergere can address that, Your Honor.

10:24AM 23 MR. BERGERE: Your Honor, that is fundamentally correct. The
10:24AM 24 permit, actually, has two limits for ammonia. There's a loading
10:24AM 25 on the screen that is calculated at the monthly average, and

10:24AM 1 the composite samples are taken weekly to determine whether
10:24AM 2 there's been an exceedance of monthly average. A grab sample
10:24AM 3 doesn't determine that. In fact, the limits under the permit
10:24AM 4 are less than the EPA and World Health Organization limits for
10:24AM 5 human exposure and drinking water, the limits of these permits.

10:24AM 6 So they don't translate to any kind of environmental harm
10:24AM 7 in the screening, which is the larger focus of Mr. Long's
10:24AM 8 testimony. He's focused more on, were these little exceedances
10:24AM 9 here and there a number of which were self-reported and which
10:24AM 10 were not untypical as grab samples of wastewater treatment
10:24AM 11 plants, did they cause environmental harm?

10:24AM 12 It's kind of like charging -- asking for an enhancement for
10:24AM 13 a bank robber because he had gasoline in his tank in his
10:25AM 14 get-away car and gasoline has benzene in it, so let's do an
10:25AM 15 enhancement because there's hazardous substances in his vehicle
10:25AM 16 and they came out in the exhaust.

10:25AM 17 Treatment plants operate all the time -- this is not a
10:25AM 18 manufacturing plant, they don't bring ammonia there, they don't
10:25AM 19 emit it, except in connection with the operation of the
10:25AM 20 treatment plant. And there's no samples that have been provided
10:25AM 21 that establish harm, even though, every once in a while, there
10:25AM 22 may have been an occasional exceedance with a grab sample,
10:25AM 23 which is not part of the loading and determination as to
10:25AM 24 whether there's any environmental harm involved from the
10:25AM 25 emission of or discharge of ammonia.

10:25AM 1 And the flow. The flow at this treatment plant is -- this
10:25AM 2 permit has authorized 140,000 gallons a day, the plant
10:25AM 3 discharges a fraction of that, perhaps, 40 at most, 60 percent
10:25AM 4 of that. So there's almost no chance -- in fact, the expert
10:25AM 5 would tell you -- there isn't a chance that the plant could
10:25AM 6 have exceeded any of the in-stream values that are set forth in
10:25AM 7 the permit.

10:25AM 8 THE COURT: All right.

10:26AM 9 MR. HARRELL: Your Honor, I'll just try not to repeat what I
10:26AM 10 said before, but the question you posed is whether 2(q)1.2
10:26AM 11 applies to this case. The question of harm is the guided
10:26AM 12 departure issue, which is down the road in the guidelines
10:26AM 13 analysis, but ammonia is a hazardous substance. The plant was
10:26AM 14 authorized to discharge ammonia within certain limits.

10:26AM 15 There's no question, no dispute that you heard that ammonia
10:26AM 16 was discharged here, and their sampling shows that there were
10:26AM 17 ammonia exceedances, and we don't know for many, many, many
10:26AM 18 days how the plant was operating and whether it was discharging
10:26AM 19 ammonia in excess of permitted limits, because there was no
10:26AM 20 sampling being done. Sampling reporting are just as much a
10:26AM 21 substantive part of the permit as numerical effluent. Thank
10:26AM 22 you, Your Honor.

10:26AM 23 MR. BERGERE: But as has been pointed out, and as pointed
10:26AM 24 out in the papers, 2(q)1.3 is the one that's typically applied
10:26AM 25 in sewage cases, because the Department, EPA and everybody else

10:27AM 1 treats sewage -- it's not -- these as non-conventional
10:27AM 2 pollutants in wastewater treatment plants, it's not a
10:27AM 3 manufacturing plant.

10:27AM 4 And the cases where 2(q)1.2 are applied are for industrial
10:27AM 5 discharges or other kinds of operations, the lead paint that we
10:27AM 6 talked about, they're really toxic discharges that those
10:27AM 7 provisions are used for those bad, really a lot of them
10:27AM 8 unpermitted, completely unpermitted discharges, and EPA is
10:27AM 9 asking to export that provision to apply to treatment plants,
10:27AM 10 which it's not done in the past and which the Courts have not
10:27AM 11 done in the past.

10:27AM 12 THE COURT: All right.

10:27AM 13 MR. SHEPPARD: One more point, Your Honor. That's why,
10:27AM 14 actually, in the indictment in this case, the Government
10:27AM 15 alleged discharge of the pollutant ammonia nitrogen in
10:27AM 16 Paragraph 17 of the indictment.

10:27AM 17 MR. HARRELL: Your Honor, I'll just point out that that's
10:27AM 18 the statutory element that has to be proven, and so the
10:27AM 19 indictment tracked the language of the indictment.

10:27AM 20 THE COURT: I would understand that. Is there anything else
10:27AM 21 on this issue?

10:28AM 22 MR. SHEPPARD: No, I don't believe so, Your Honor, other
10:28AM 23 than I would just point out that, again, it's the Government's
10:28AM 24 burden, with regard to showing the application of a particular
10:28AM 25 guideline and the relevant conduct here. I don't believe they

10:28AM 1 met that burden, again, because we don't believe there's any
10:28AM 2 evidence, Your Honor, of any discharge here that arises from
10:28AM 3 the count of conviction, which is the cornerstone and the
10:28AM 4 touchstone for the determination of proper guidelines.

10:28AM 5 THE COURT: Is there anything else that we want to cover
10:28AM 6 this morning on the issue of objections? The calculation will
10:28AM 7 turn on whatever I determine applies, in terms of (q)1.2 or
10:29AM 8 (q)1.3, I take it?

10:29AM 9 MR. HARRELL: Well, partly, Your Honor. And I guess this
10:29AM 10 really depends on how far the Court wants to go this morning. I
10:29AM 11 think the parties agree -- I'm almost afraid to say that -- but
10:29AM 12 I think the parties agree, Your Honor, that these two
10:29AM 13 guidelines run parallel to each other, and that the big
10:29AM 14 difference -- the substantive difference between the two is the
10:29AM 15 8 versus the 6 starting point.

10:29AM 16 The other issues, Your Honor, in terms of the objections we
10:29AM 17 have interposed, particularly, whether any of the substantive 1
10:29AM 18 through 4 enhancements, two of which the Probation Officer and
10:29AM 19 Government have sought to apply, which we have objected to,
10:29AM 20 they run parallel in both guideline sections, so the arguments
10:29AM 21 are essentially the same.

10:29AM 22 So our argument, Your Honor, succinctly stated, at least,
10:30AM 23 I'll try to be succinct, is that the record-keeping offense to
10:30AM 24 which Mr. Klepadlo has pled guilty to, there is no substantive
10:30AM 25 enhancement that should apply. If you look at both guidelines,

10:30AM 1 Your Honor, it says that if the record-keeping offense, which
10:30AM 2 is very broadly defined in both guidelines as including the
10:30AM 3 submission of false reports, which is what our client has
10:30AM 4 admitted to, if it's a record-keeping offense that was intended
10:30AM 5 to conceal a substantive violation of the permit.

10:30AM 6 For example, if there was a change in the form, a false
10:30AM 7 number written down to hide an exceedance, then, Your Honor,
10:30AM 8 the guideline properly says you should apply the substantive
10:30AM 9 enhancements.

10:30AM 10 In this case, Your Honor, there is no evidence of any
10:31AM 11 intention by my client to conceal any violation here. In fact,
10:31AM 12 as I noted earlier, Mr. Klepadlo admitted to the DEP
10:31AM 13 investigators, who are here and who will testify, and there's a
10:31AM 14 report, Your Honor, that is attached to somebody's memo, either
10:31AM 15 theirs or ours, that says my client, as early as 2013, admitted
10:31AM 16 to the DEP investigators that they did not go to the plant
10:31AM 17 every day, that they went, in his view and his understanding
10:31AM 18 was that they were going, at least, a couple times a week,
10:31AM 19 which meant that they were taking samples a couple times a
10:31AM 20 week, including the weekly composite samples, which we all
10:31AM 21 agree are the most important.

10:31AM 22 That's what my client believed in 2013, it's what he
10:31AM 23 believed in 2015 when he was interviewed by the FBI and the EPA
10:31AM 24 agents that are assigned to this case. It's the reason why he's
10:31AM 25 pled guilty. He has admitted that. He said to them, at the

10:32AM 1 time, that, in his view, daily testing of the pH and the DO
10:32AM 2 were not necessary for the safe treatment of the plant, and
10:32AM 3 that the pH levels would never vary between the ranges that
10:32AM 4 were set in the permit, and, Your Honor, that is, in fact, the
10:32AM 5 case. He also said, Your Honor, that he didn't feel it was
10:32AM 6 necessary to take all the other daily samples at both plants.
10:32AM 7 He admitted to that.

10:32AM 8 What he didn't admit to, Your Honor, and what they are
10:32AM 9 trying to now bring back into the case is that he didn't know
10:32AM 10 that the sewage treatment plant operator, who they will admit
10:32AM 11 was primarily assigned to these two plants, was not going with
10:32AM 12 the frequency that he believed he was.

10:32AM 13 So, in fact, we have this surveillance that shows that Mr.
10:32AM 14 Sheposh, who was the operator, the certified operator for these
10:32AM 15 two plants, was not, in fact, going. But, Your Honor, on the
10:33AM 16 issue of concealment and on the issue of my client's intent,
10:33AM 17 which is what's important here, there was no effort to conceal
10:33AM 18 the fact that they were not going to the plant every day. In
10:33AM 19 fact, the evidence is directly to the opposite.

10:33AM 20 So, Your Honor, in our view, and our argument is that, as a
10:33AM 21 matter of fact and as a matter of law, the substantive
10:33AM 22 enhancements of 1 through 4 of each of those guidelines,
10:33AM 23 whether it's 2(q)1.2 or 2(q)1.3 do not apply, and this is, in
10:33AM 24 fact, a record-keeping offense, and, therefore, the guideline
10:33AM 25 range should not be enhanced by either sub 1 or sub 4, which

10:33AM 1 are the continuous discharge in violation of a permit, and No.
10:33AM 2 4, which is -- I can't remember -- but they both relate to
10:33AM 3 substantive offenses, again, Your Honor, which are not --

10:33AM 4 THE COURT: So you're talking about Paragraphs 25 and 26?

10:34AM 5 MR. SHEPPARD: Yes.

10:34AM 6 THE COURT: Is that right?

10:34AM 7 MR. SHEPPARD: Yes, Your Honor.

10:34AM 8 THE COURT: Got it.

10:34AM 9 MR. SHEPPARD: I'm sorry, Your Honor. Again, the key is,
10:34AM 10 under the guidelines, where it's a record-keeping offense,
10:34AM 11 which is defined in the guidelines, very broadly, clearly
10:34AM 12 captures the offense conduct here, unless there is evidence of
10:34AM 13 an intention to conceal, the substantive enhancements that are
10:34AM 14 sought to be applied by the Government do not apply.

10:34AM 15 THE COURT: All right. Anything you want to say about that?

10:34AM 16 MR. HARRELL: Yes, Your Honor. Whether they sampled two days
10:34AM 17 a week for daily samples or they sampled two days a month, they
10:34AM 18 weren't testing every day, as Mr. Sheppard just acknowledged.
10:34AM 19 Yes, it's true his client admitted to various regulators over a
10:34AM 20 period of years that he didn't think it was necessary to take
10:34AM 21 samples every day, that he knew better than what was in the
10:34AM 22 permit, that he admitted he wasn't taking samples every day,
10:34AM 23 but he continued to lie on the DMR's he sent to the DEP.

10:35AM 24 They put in sample numbers for every day, he admitted, in
10:35AM 25 person, that he had failed to comply with the permits

10:35AM 1 requirement for daily testing --

10:35AM 2 THE COURT: Let me get that straight. So you suggest that he
10:35AM 3 did try to conceal by submitting false samples every day?

10:35AM 4 MR. HARRELL: False results for every month, for days. If
10:35AM 5 you're not concealing, why make up bogus numbers?

10:35AM 6 THE COURT: Well, that's how you encounter the concealment
10:35AM 7 argument?

10:35AM 8 MR. HARRELL: Absolutely.

10:35AM 9 THE COURT: Understood.

10:35AM 10 MR. SHEPPARD: Your Honor, may I just briefly respond? Very
10:35AM 11 briefly. Your Honor, if that's what he did, he didn't do a very
10:35AM 12 good job of concealing, number one.

10:35AM 13 Number two, Your Honor, the evidence in this case, Mr.
10:35AM 14 Sheposh wore a wire, he recorded over 50 conversations. The
10:35AM 15 best evidence of the lack of my client's knowledge is in those
10:36AM 16 intercepts. When he says to Joe Sheposh, I told them we were
10:36AM 17 not there every day, and Joe says, Well, I told them we were.
10:36AM 18 His response is, You did? That's what's on the tape. Your
10:36AM 19 Honor, there was no he effort to conceal what he has admitted
10:36AM 20 to.

10:36AM 21 Your Honor, with regard to the DMR's, again, it's Mr.
10:36AM 22 Klepadlo's name on the door, we get that, he clearly is a
10:36AM 23 responsible officer, and we understand that, too. But with
10:36AM 24 regard to his intent to conceal, Your Honor, Joe Sheposh was
10:36AM 25 the certified operator, he was the one who signed the forms.

10:36AM 1 They were submitted by Mr. Klepadlo as the responsible officer.
10:36AM 2 That's why we're pleading guilty here. But there was no effort
10:36AM 3 by my client to conceal anything. That's our argument.

10:36AM 4 MR. HARRELL: Your Honor, if I understand the chronology,
10:37AM 5 Mr. Sheposh would prepare the DMR, would show a daily sample
10:37AM 6 for every day of the month. Mr. Klepadlo has admitted that he
10:37AM 7 knew Mr. Sheposh was not taking daily samples. He wasn't taking
10:37AM 8 daily samples, but he's still signing a report that has numbers
10:37AM 9 for daily samples. That's concealment.

10:37AM 10 As for the number of recorded conversations, I think that's
10:37AM 11 just a difference in somehow counting, because we have a much
10:37AM 12 lower number, but that's not really relevant to the discussion
10:37AM 13 on this particular issue.

10:37AM 14 MR. BERGERE: Your Honor, if I might rise on that issue.
10:37AM 15 The sequence of events is important to understand. Joe Sheposh
10:37AM 16 was the operator. Joe Sheposh would collect samples, and he
10:37AM 17 would take them, physically, to the laboratory. The laboratory
10:37AM 18 would analyze them and put the results on the DMR form at the
10:37AM 19 laboratory, based on the samples that they received.

10:37AM 20 The Government has the sheets from Microbac Lab, where Joe
10:38AM 21 Sheposh dropped them off, he relinquished control of them
10:38AM 22 there. Mr. Klepadlo is sitting in his kitchen and on his
10:38AM 23 computer, the DMR forms show up completed, except for pH. Joe
10:38AM 24 Sheposh would come to his house, would sit down at his table,
10:38AM 25 would sign the certification saying, I swear that everything in

10:38AM 1 there is true.

10:38AM 2 As to the Greenfield treatment plant, there was no
10:38AM 3 requirement to record in the DMR the daily pH's, the only thing
10:38AM 4 they recorded was a range. On the Benton-Nicholson forms, there
10:38AM 5 was a daily, because they changed the form, the daily form,
10:38AM 6 when the permit was renewed.

10:38AM 7 The Greenfield Township permits of 2009 hasn't been renewed
10:38AM 8 in a decade, but Mr. Sheposh filled those things in. And as he
10:38AM 9 told the officer, Mr. Sheposh said he recorded those numbers in
10:38AM 10 his iPad or Notepad, that he filled them out. My client didn't
10:38AM 11 know that he was filling out all of those numbers, except as to
10:38AM 12 Benton-Nicholson as to the pH. Those are the days he knew he
10:38AM 13 wasn't showing up, and he recorded it in a range.

10:39AM 14 In his own mind, the pH didn't vary, because it's ground
10:39AM 15 water, it's not going to vary anywhere near the permit limits.
10:39AM 16 In his own mind, that was the risk that he accepted, but all
10:39AM 17 the other falsifications, Mr. Sheposh was showing up with
10:39AM 18 samples, the issues we all have is where he was getting them
10:39AM 19 from, we don't know, but he is responsible for that conduct,
10:39AM 20 and that's not what we're pleading to.

10:39AM 21 THE COURT: All right.

10:39AM 22 MR. HARRELL: Your Honor, I don't have anything to add.

10:39AM 23 THE COURT: Okay. Anybody want to say anything else? I'll
10:39AM 24 give you the last word.

10:39AM 25 MR. SHEPPARD: He rises with some trepidation. Your Honor, I

10:39AM 1 know the Court has other things on the schedule here, but there
10:39AM 2 are, as Mr. Harrell pointed out, two guided departures, that if
10:39AM 3 the Court were to apply these substantive enhancements under 1
10:39AM 4 and 4 of the guideline range, it's our argument, in the
10:40AM 5 alternative, that there should be a two-level decrease, as set
10:40AM 6 forth in those guidelines, themselves, because of a lack of
10:40AM 7 environmental harm here and the seriousness or the lack of
10:40AM 8 seriousness of our client's conduct or, at least, his
10:40AM 9 intentions.

10:40AM 10 THE COURT: Well, I understand that. I'm not going to
10:40AM 11 determine that. I'll give you an opportunity to argue that when
10:40AM 12 we have sentencing.

10:40AM 13 MR. SHEPPARD: And in terms of the guidelines, Your Honor,
10:40AM 14 those were the objections --

10:40AM 15 THE COURT: All right.

10:40AM 16 MR. SHEPPARD: -- that we had interposed. So those were the
10:40AM 17 guideline objections.

10:40AM 18 THE COURT: All right. I will take this under advisement,
10:40AM 19 and we will reschedule -- we will schedule another date for
10:40AM 20 sentencing. In the meanwhile, I'll determine the issues here
10:40AM 21 and issue an opinion in short order.

10:41AM 22 MR. SHEPPARD: Thank you, Your Honor.

10:41AM 23 MR. HARRELL: Thank you.

10:41AM 24 THE COURT: Sorry for the inconvenience, but there were so
10:41AM 25 many documents filed here that I thought this was the best way

10:41AM 1 to handle this. I know everybody has traveled here, and I know
10:41AM 2 it's expensive, and I apologize for that, but I think, in order
10:41AM 3 to give it the proper care and treatment that it deserves, this
10:41AM 4 is the best way to proceed.

10:41AM 5 MR. SHEPPARD: We understand that, Your Honor. And if I may,
10:41AM 6 sir, just one other point. With regard to the Board resolution
10:41AM 7 that was received this morning, Your Honor, this is the first
10:41AM 8 that we have heard there is an issue of restitution here,
10:41AM 9 though, we have been told that one may be coming.

10:41AM 10 Your Honor, we would like the opportunity to try to address
10:41AM 11 in the interim, if we may. I think our argument is going to be
10:41AM 12 very similar, in that, there is no restitution that should flow
10:41AM 13 from the count of conviction, which, again, under the mandatory
10:41AM 14 witnesses act --

10:42AM 15 THE COURT: I looked at this this morning. I don't see
10:42AM 16 any -- I see a lot of whereas clauses, I see no, be it
10:42AM 17 resolved. So I don't know what this means, so I'll give you an
10:42AM 18 opportunity to -- I'll give both sides an opportunity to
10:42AM 19 determine what to do with it. I don't know what to do with it
10:42AM 20 at the moment.

10:42AM 21 MR. SHEPPARD: Thank you, Your Honor.

10:42AM 22 THE COURT: All right, thank you. Thank you all.

23 (At this time the proceedings were adjourned.)

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C E R T I F I C A T E

I, KRISTIN L. YEAGER, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

S/Kristin L. Yeager
KRISTIN L. YEAGER, RMR, CRR
Official Court Reporter

REPORTED BY:

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